No. 18,239

IN THE

United States Court of Appeals

For the Ninth Circuit

S. H. Kress & Co.,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board

REPLY BRIEF FOR S. H. KRESS & CO.

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The Board's Decision and Order in this case must stand or fall on its own two feet. The arguments presented in the brief filed by the General Counsel for the Board do not strengthen, support or validate the decision of the Board itself. All of the points discussed in the Board's brief have been met and answered in Petitioner's opening brief. However, this short reply may serve to narrow the issues and facilitate the Court's review.

1. THE "REASONABLE TENDENCY" TEST SET FORTH IN THE BOARD'S BRIEF IS INAPPOSITE.

Interrogation by an employer of his employees with respect to their union membership or activity is not unlawful per se on the theory that it necessarily tends to interfere with or coerce the employees.

(a) The cases cited in Petitioner's opening brief (pages 26-47) indicate that there must be *actual* interference, restraint or coercion, based upon a background of antiunion activity, threats of reprisal, promises of benefit, or an overall pattern of illegal conduct.

(b) The decisions of this Court are in accord. In *NLRB v. McCatron,* 216 F.2d 212 at 216, it is stated without qualification that:

> "Interrogation regarding Union activity does not in and of itself violate Section 8(a)(1)."

That proposition was reaffirmed by this Court in *NLRB v. Roberts Bros.,* 225 F.2d 58 and has been cited and quoted with approval in the more recent case of *NLRB v. Sebastopol Apple Growers,* 269 F.2d 705.

In the *McCatron* case, this Court stated the test to be whether the interrogation alleged to be unlawful, contained "an express or implied threat or promise" or formed "part of an overall pattern whose tendency is to restrain or coerce." (216 F.2d at 216.)

Citation in the Board's brief of prior decisions of this Court, and reliance thereon, is misplaced. In *NLRB v. West Coast Casket Co.,* 205 F.2d 902, the interrogation of employees found to be unlawful was

accompanied by promises of economic benefits intended to influence the employees against unionization. In that case the employer, in addition to interrogating employees, committed the following acts: threatened to discharge employees who refused to cross the Union picket line; threatened to close the plant if the Union succeeded in organizing the employees; promised employees wage increases and an improved insurance program; actually discharged an employee for the purpose of discouraging union membership; and actually granted wage increases to three of the employees who were interrogated. In the *McCatron* case, this Court expressly pointed out that the interrogation in *West Coast Casket* "occurred against a background of coercive conduct."

The quotation on page nine of the Board's brief from this Court's decision in *NLRB v. Essex Wire Corp.,* 245 F.2d 589 refers to the employer's demand that an employee turn over to the company signed Union membership cards that he had obtained from other employees. Thereupon the employee, who had been ordered to bring the cards to the company office "in five minutes," immediately "returned the cards to the employees who had signed them." This Court held that "the demand that the Union cards be delivered to the foreman" was a violation of Section 8(a)(1). Obviously, such fact situation is quite different from that in the instant case.

Similarly, in *NLRB v. State Center Warehouse,* 193 F.2d 156, cited on page 11 of the Board's brief, the interrogation of employees found by this Court to

be unlawful was part of an overall pattern of conduct which included threats of closing the plant if employees joined the Union, threats of discharging employees for Union membership, and the actual discharge of one employee for that very reason.

Since the instant case contains no threats or promises, no background of antiunion animus and no overall pattern of coercive conduct, it is governed by the princples laid down by this Court in such cases as *Wayside Press,* 206 F.2d 862; *McCatron,* supra; *Roberts Bros.,* supra; and *Sebastopol Apple,* supra.

(c) Moreover, the so-called "reasonable tendency" test is not the position which was taken by the Board in its decision in the instant case. The basis of the Board's decision is its legal conclusion that petitioner's interrogation was not carried on for a legitimate purpose (see discussion below under point 2). Nothing in the Board's decision indicates that it was proceeding on a theory of "natural or reasonable tendency."

In this connection, it is noteworthy that the Board's brief on page seven states:

> "In banning 'interference' Congress clearly meant to proscribe *any* employer activity which would tend to limit employees in the exercise of their statutory rights." (Emphasis added.)

But on page 11 of the Board's brief the following statement is made:

> "This is not, of course, to say that *any* effort by an employer to ascertain the union sentiments

of his employees will *necessarily* be violative of the Act." (Emphasis added.)

It is respectfully submitted that the Board's brief, in seeking to uphold the Board's position, obscures the main issue which is the legality of petitioner's purpose and the totality of conduct involved.

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2. THE REAL BASIS OF THE BOARD'S DECISION IS ITS CONCLUSION THAT PETITIONER'S INTERROGATION OF EMPLOYEES DID NOT HAVE A LEGITIMATE PURPOSE.

In discussing petitioner's investigation of the Union's showing of interest, the Board stated flatly:

> "Interrogation, conducted for such purpose, serves no useful function and is not conducted for a purpose 'legitimate in nature.'" (R. 21)

Later in its opinion, the Board refers to:

> "* * * our conclusion that no useful or legitimate purpose is served or can be served by systematic employer interrogation undertaken for the purpose of investigating the adequacy of a petitioner's showing of interest." (R. 22-23)

That the Board's decision depends entirely upon the purpose of petitioner's interrogation is further made clear by its reference to its previous decision in the *Blue Flash* case, 109 NLRB 591. Referring to that case, the Board states:

> "The Board there held that such interrogation, *conducted for a 'purpose legitimate in nature'* * * * did not tend to restrain or interfere with employees' exercise of rights guaranteed by the

Act *simply because of the systematic nature of the interrogations.*" (R. 20; emphasis added.)

Thus, the argument in the Board's brief that petitioner's purpose is immaterial to the consideration of this case is patently erroneous.

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3. THE BOARD FOUND THAT PETITIONER'S PURPOSE WAS NOT LEGITIMATE BECAUSE IT RELATED TO THE UNION'S SHOWING OF INTEREST RATHER THAN THE UNION'S MAJORITY STATUS.

(a) This distinction is without foundation or merit. The two purposes are interrelated. Petitioner's ultimate purpose was to ascertain the Union's majority status. Its immediate purpose was to determine the Union's showing of interest. Obviously, if the Union did not represent 30 per cent of the employees, it did not represent a majority. Petitioner undertook its interrogation *only after* a substantial number of employees voluntarily reported to management that they did not believe that the Union had secured authorizations from 30 per cent of the employees. Contrary to the assertion in the Board's brief (page 5, footnote 7), this is not an argument advanced by petitioner; *it is a fact* contained in the stipulation submitted to the Board. (Stipulation of Facts, page 4, paragraph IX, R. 11.)

(b) While it is true that in the *Blue Flash* case, supra, the Union had made an express and direct demand upon the employer for recognition, no such demand or claim of representation was made by the

Union in *NLRB v. California Compress Co.,* CA 9, 274 F.2d 104; *NLRB v. Firedoor Corp.,* CA 2, 291, F.2d 328; *NLRB v. Crystal Laundry,* CA 6, 308 F.2d 626, referred to in Petitioner's opening brief. Nothing in the Court decisions indicate that interrogation is unlawful per se *unless* it is preceded by a Union claim of representation and demand for recognition.

In fact, in *Crystal Laundry* the Union had neither demanded recognition *nor* filed a petition for election. Yet the systematic and repeated polling of employees as to their Union membership and activity was held lawful in that case, even though the employer engaged in a vigorous expression of antiunion animus and took no steps to assure the employees against reprisals.

In *California Compress* this Court held interrogation unlawful because it was accompanied by threats of reprisal *and* because its purpose was to undermine the Union, not to challenge the validity of the Union's showing of interest. This Court's decision was *not based* upon the fact that the Union had not made an express, direct demand for recognition upon the employer but had simply filed a petition for election with the Board.

Notwithstanding the arguments in its brief (page 13, footnote 16) the Board itself has repeatedly held that the "filing itself" of a petition for election by a Union constitutes a "sufficient" demand for recognition. See *Florida Tile,* 130 NLRB No. 103; *Tyree's Inc.,* 129 NLRB 1500.

Section 9(c)(1)(A) of the Act refers to the filing of a petition by a Union as alleging that the employer

declines to recognize the Union "*as the representative* (of employees) *as defined in section 9(a)*" (Emphasis added, see Appendix.)

Section 9(a) provides that: "Representatives designated or selected * * * by the *majority* of the employees in a unit appropriate * * * shall be the *exclusive representative* of all the employees in such unit * * *" (Emphasis added, see Appendix.)

Thus, the statute itself expressly contemplates that the filing of a petition for election by a Union constitutes an assertion of majority status and a demand for recognition as exclusive bargaining representative.

---

4. THE BOARD'S POSITION THAT AN EMPLOYER HAS NO LEGITIMATE PURPOSE IN QUESTIONING A UNION'S SHOWING OF INTEREST IS ERRONEOUS AS A MATTER OF LAW.

This is the key issue in the case.

In its brief, the Board seeks to defend its position on the grounds that such interrogation usurps the Board's function and authority; invades the employees' right of privacy; conflicts with the Board's administrative rule against litigating the issue of showing of interest; and could lead to retaliation and discrimination.

None of the foregoing reasons meets the test laid down by the courts on the legality of interrogation.

The Board's contention that no useful purpose can be served by such interrogation is directly contrary to its own decisions in which election petitions filed by Unions were dismissed upon evidence submitted by

employers successfully challenging the Union's showing of interest. See *Globe Iron Foundry,* 112 NLRB 1200; *Columbia Records,* 125 NLRB 1161.

Moreover, the Board's brief is incorrect in characterizing the showing of interest rule as simply an "administrative expedient" to save the government time, effort and money. As the Board's own decisions show, the rule in question is not merely an administrative requirement to be applied by the Regional Offices in determining whether to investigate the petition, schedule a hearing, and otherwise process the case. It is regarded by the Board as a *condition precedent* for directing ard holding the election itself, *even where,* after a hearing, all of the other necessary elements have been found to exist. (See *Tyree's Inc.,* supra, at 1503, footnote 8; *Swift & Co.,* 127 NLRB 87 at 88, footnote 2.)

In terms of usurping the Board's authority, is not subjecting employees to systematic, private polls conducted by an employer, with none of the safeguards which are part of the Board's secret ballot procedures, a much more substantial infringement of the Board's function, to say nothing of an invasion of employees' privacy? Nevertheless, such conduct has repeatedly been held lawful both by the Board and the courts. (See Petitioner's opening brief, pages 32-33.)

For example, in the *Crystal Laundry case,* supra, the employer polled his employees on four separate, successive occasions, even though the results of each poll were unanimously or overwhelmingly against the Union. What justification existed for each additional

instance of interrogation? What useful purpose was to be served?

How can the Board's decision in the instant case be reconciled with its recent decision in *Philanz Oldsmobile, Inc.,* 137 NLRB No. 103 (discussed in Petitioner's opening brief, pages 48-50), where a strike was held lawful even though the conceded purpose was to compel the employer, by economic force and coercion, to agree to a "consent" election instead of proceeding with a hearing before the Board. The dissenting opinion in that case pointed out, in effect, that such conduct by the Union clearly usurped the function and authority of the Board.

Finally, in *California Compress Co.,* supra, this Court has clearly indicated that interrogation by an employer "to check the authenticity of the Union's claim of interest" or "to gather evidence to assist the Board in determining the authenticity of the showing of interest made by the Union" is *not unlawful per se.* Nothing in the Court's decision in that case suggests that such purpose cannot be "legitimate in nature."

In *California Compress,* this Court sustained the Board's finding that the purpose of the interrogation was to undermine the Union, and not to ascertain the validity of the Union's showing of interest, on the basis of substantial evidence showing that the interrogation was conducted in an atmosphere of explicit threats of reprisal and actual coercion. The overall pattern of the interrogation in that case showed hostility to the Union and was accompanied by threats to discharge every employee who had signed a Union card.

When an employer, in interrogating employees, tells them that he is informed that about 50 out of 86 have signed up with the Union, that he intends to find out who they are, and that if he finds out, he will fire every one of them, there is no question but that this Court must sustain a finding that the purpose of such interrogation is to undermine the Union and not to challenge the Union's showing of interest.

But there is no such evidence in the instant case. The facts in the instant case resemble those in *Blue Flash,* supra, and the various decisions of this Court and other courts (cited in Petitioner's opening brief) where interrogation occurred against background free of employer hostility to Union organization, where the employer assured the employees that there would be no economic reprisals, and where no threats or promises were made.

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5. THE BOARD HAS IMPROPERLY TAKEN A "PER SE" APPROACH IN THIS CASE.

The "per se" approach in cases involving interrogation of employees has been unequivocally rejected by this Court and virtually all of the Courts of Appeals. (See *NLRB v. Roberts Bros.,* supra.)

Although a "per se" approach is disclaimed in the Board's brief, it is perfectly plain the Board's decision that it is taking the position that interrogation for the purpose of challenging or ascertaining the validity of a Union's showing of interest is unlawful per se. After concluding that such purpose is not

legitimate, the Board expressly states that such interrogation "*necessarily* tends to interefere with and restrain employees * * * and to interfere with the election processes of the Board." (R. 23) (See point 2, above.)

This can only be characterized as a "per se" approach. It is clearly inconsistent with the "totality of conduct" test formulated by the Board in its *Blue Flash* decision.

What are the circumstances which comprise a "totality of conduct"? They are the answers to such questions as *who, what, when; where* and *how.*

With respect to the circumstance "*Who,*" the assertion in the Board's brief (pages 10 and 12, footnote 15) that only "casual, perfunctory interrogation by minor supervisory employees" has been held lawful is completely erroneous. The cases cited in Petitioner's opening brief (pages 26-47) involved not only store managers, personnel directors, department managers, district managers and shop superintendents, but also plant superintendents, general managers, presidents, vice presidents and partners.

With respect to the circumstance "*What,*" the stipulated record shows that petitioner made no threats, promises or any coercive an antiunion statements at all.

With respect to the circumstance "*When,*" the interrogation occurred during the ordinary working day and did not intrude upon the employees' own time.

With respect to the circumstance *"Where,"* the record shows that the employees were *not called* into the manager's office. Nor were they approached in their own homes.

With respect to the circumstance *"How,"* the stipulated record shows that Petitioner took all possible affirmative steps to assure the employees against any fear of reprisals. The purpose of the interrogation was communicated to the employees; they were expressly told that they were under no obligation to answer any questions or to give any information. In fact, the employees were told that they were free to leave at any time, and they could have left immediately, even before they were questioned. Moreover, Petitioner made no statements about the Union and did not ask the employees to make any statements about the Union. There is no antiunion animus in this case, and none was found by the Board.

Finally, it is noteworthy that nothing in the complaint issued by the General Counsel of the Board alleges that the manner in which the interrogation was conducted constitutes a violation of the Act.

CONCLUSION

Obviously, this case can only be decided in terms of the *purpose* of the interrogation and the *circumstances* under which it was conducted. That is the substance of the test laid down by this Court in the *McCatron* case.

For all of the foregoing reasons, it is respectfully submitted that petitioner's purpose was legitimate and that the circumstances were not coercive. Therefore, the petitioner's conduct was lawful, and the Board's finding of a violation should be set aside.

Dated, San Francisco, California,
March 25, 1962.

Respectfully submitted,
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(Appendix Follows)

Appendix.

Appendix

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the repre-

sentative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor oganizations have presented to him a claim to be recognized as the respresentative defined in section 9 (a);